

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Date: June 1, 2001

Case No.: **2000-INA-172**
CO No. **P1998-VA-03267811**

In the Matter of:

GOURMET PIZZA DELI
Employer.

On behalf of:

JOSE B. MARTINEZ
Alien.

Appearance: Germaine W. Sobral, Esquire
Falls Church, Virginia
For Employer and Alien

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This matter arises from Gourmet Pizza Deli's ("Employer") request for Review of the United States Department of Labor Certifying Officer's ("CO") denial of an application for permanent alien labor certification for the position of Cook (hotel & rest.)¹. Employer's request for review was made pursuant to 20 C.F.R. 656.26. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR").²

¹ The position of Cook (hotel & rest.) is classified under the Dictionary of Occupational Titles code 313.361-014.

² We base our decision on the records upon which the CO denied the certification and Employer's request for review as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c). Unless otherwise noted, all regulations cited in this section are in Title 20.

STATEMENT OF THE CASE

On July 23, 1997, Employer filed an application for alien labor certification to fill the position of Cook (Hotel & Restaurant). (AF 28-39). The duties were described as follows: “to cook, prepare and season soups, meats, vegetables, desserts, and other food stuffs in the American Style Cuisine.” (AF 28). Employer required two years in the job offered. *Id.*

On July 23, 1997, the CO issued his Notice of Findings (“NOF”) signifying his intent to deny the application. (AF 15-17). The CO found that the application contained an unduly restrictive job requirement. It was the CO’s determination that the job was actually a combination of two positions with lesser qualifications, Sandwich Maker and Baker, Pizza. These positions require one year of experience at most. (AF 16-17). After considering the three definitions, the duties as described by Employer, and Employer’s menu “(food items with limited preparation time and limited skill in preparation),” the CO determined that two years of experience in the job offered was excessive. Employer was told to either reduce the requirements or submit evidence establishing that the requirement arises from a business necessity. (AF 17).

Employer submitted its rebuttal on January 20, 1999. It consisted entirely a one-page letter from Employer and a cover letter from its attorney. (AF 13-14). The letter stated that the Alien is currently an employee and that his duties are “creating recipes for use in our dining room, delivery and carry-out [*sic*] Some of which are: marinara sauces, chili, soups/chowders, bean dips, barbecue, salad dressings, seafood dishes, pastas, desserts, poultry dishes, various side dishes, etc.” (AF 14). Employer stated that the Alien also supervised the kitchen staff. *Id.*

The CO’s Final Determination (“FD”) denying certification was issued on January 29, 1999. (AF 11-12). First the CO noted that the menu establishes Employer as primarily a Pizza and Sandwich shop. Further, although Employer alleged that he would be preparing “seafood dishes, pastas, and various side dishes” those items were not demonstrated by the menu. The CO noted that there is no indication that the menu ever changes in the restaurant, and that there were no complex dishes on the menu. Accordingly, the CO found that Employer had not rebutted the determination that the experience requirement was excessive and thus unduly restrictive. (AF 12). Employer requested review on March 10, 1999. After one remand to complete the case file, the case was returned to the Board, and is before the Panel for review.

DISCUSSION

First, we note that we agree with the CO’s determination that the position was misclassified. Using the DOT as an “occupational guideline” is necessary as the DOT is unable to list every job opportunity within the United States. Thus, the DOT must be utilized in a fashion that supports the intent of the law, and provides a flexible framework which must then be analyzed “in the context of the nature of Employer’s business and the duties of the job itself.” *Trilectron Indus.*, 1990-INA-188 (Dec. 19, 1991). As a result, it has been held that the CO may challenge, *inter alia*, the employer’s classification of a particular position. *Downey Orthopedic*

Medical Group, 1987-INA-674 (Mar. 15, 1988) (*en banc*). Employer is then required to provide sufficient evidence to rebut the re-classification. *Theresa Vasquez*, 1997-INA-531 (July 9, 1998).

As the DOT definition of Cook strongly suggests, the relatively long experience requirement is related to special skills in the kitchen, in regards to food preparation and kitchen administration. Applying the DOT definition of Cook to Employer's menu, we find that the degree of knowledge and experience needed to master the food items offered by Employer is better matched with the definition found in the DOT's definition of Baker, Pizza and Sandwich Maker, because the menu consists almost entirely of Pizzas, Salads and Sandwiches. While it is true that there are a few items offered in Employer's menu that would not normally be performed by a Baker, Pizza and Sandwich Maker, those items are so limited in complexity and number that the need for a Cook as defined in DOT 313.361-014 with the two years experience is not justifiable on the record presented.

Employer still could have justified the requirement, as stated in the NOF, by submitting documentation that demonstrates a business necessity for the requirement. In order to demonstrate business necessity, an employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 1990-INA-387 (July 30, 1991).

Employer's sole piece of evidence documenting business necessity on rebuttal was an unsubstantiated and self-serving letter signed by the owner/manager of Employer, asserting that it required a Cook based on a list of cooking duties delineated within the letter. A bare assertion without supporting reasoning or evidence is generally insufficient to carry Employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988). Furthermore, Employer never even alleges in the rebuttal that two years of experience in the job is necessary.³ As such, we find that Employer has failed to document business necessity for the restrictive requirement, and the following order shall enter.

³Instead, Employer argues that it is a business necessity to employ the specific Alien. (AF 14). This entails an entirely different issue not raised before the Board.

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.